STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 8, 2013
v	No. 304358 Kent Circuit Court
SEVAUGHN TAHLYIEL CHEVIS, Defendant-Appellant.	LC No. 10-001166-FC

Before: MURPHY, C.J., and SAAD and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a). He was sentenced to concurrent terms of 10 to 40 years' imprisonment. We affirm.

Defendant's convictions stem from allegations that he engaged in oral sexual penetration with six-year-old male twins during the summer of 2008. The mother of the twins testified that defendant lived next door to them during the time in question and that she allowed the twins to go to defendant's home to play video games with him. The twins, who were eight years old at the time of trial, testified that defendant made them engage in sexual acts with him before defendant would permit them to play video games. The twins both claimed, among other allegations, that defendant made them "suck" defendant's "private" part. One of the twins indicated that defendant "made milk" and that "milk" came out of defendant's penis. Defendant was 14 years old when the offenses were committed, and he was initially charged as a juvenile. Defendant rejected a plea offer made in the juvenile court and was subsequently charged and convicted as an adult. After sentencing, defendant filed a motion for new trial, which was denied. Thereafter, this Court granted defendant's motion to remand "for an evidentiary hearing and a determination whether defendant . . . received constitutionally-deficient representation . . . for the reason stated in defendant's motion[.]" *People v Chevis*, unpublished order of the Court of Appeals, entered June 13, 2012 (Docket No. 304358). The order allowed defendant to file "a supplemental brief pertaining to the issue raised on remand." *Id.* Defendant's remand motion focused primarily on defense counsel's "failure to consult with and present an expert in forensic psychology at [defendant's] trial." The remand motion also mentioned defense counsel's failure

to utilize the Michigan Forensic Interview Protocol in cross-examination of the prosecution's witnesses. Following a *Ginther*[1] conducted on remand, the trial court again denied defendant's motion for new trial, rejecting the claims of ineffective assistance of counsel.

On appeal, defendant argues that the trial court erred in denying the motions for new trial, setting forth a litany of alleged instances of ineffective assistance of counsel. We review a trial court's ruling on a motion for new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). However, an underlying claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law, and we review the trial court's factual findings for clear error, while constitutional issues are reviewed de novo. *People v Grant*, 470 Mich 477, 484-485; 684 NW2d 686 (2004). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court recited the well-established principles applicable to an ineffective assistance claim:

> A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy [a] two-part test. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the counsel guaranteed by the Sixth Amendment. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. [Citations and internal quotation marks omitted.]

Establishing deficient performance requires a showing that counsel's "representation fell below an objective standard of reasonableness[.]" *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). In *People v Trakhtenberg*, 493 Mich 38, 52-53; 826 NW2d 136 (2012), the Supreme Court explained:

> In examining whether defense counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy. Yet a court cannot insulate the review of counsel's performance by calling it trial strategy. Initially, a court must determine whether the strategic choices were made after less than complete investigation, and any choice is reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. Counsel always retains the duty to make reasonable investigations

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

> or to make a reasonable decision that makes particular investigations unnecessary. In this case, the trial court and the Court of Appeals erred by failing to recognize that defense counsel's error was the failure to exercise reasonable professional judgment when deciding not to conduct any investigation of the case in the first instance. Accordingly, no purported limitation on her investigation of the case can be justified as reasonable trial strategy. [Citations, internal quotation marks, and brackets omitted.]

"[T]his Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). The failure of a particular trial strategy to work does not mean that counsel's performance was ineffective. *Id.* at 61.

Defendant first asserts that defense counsel failed to adequately challenge the inconsistency of the twins' testimony. We disagree. Defense counsel challenged the testimony of the two boys and attempted to impeach them with prior inconsistent statements. While one child testified on direct examination that he twice had to perform oral sex on defendant, that his brother had to do the same thing, and that defendant engaged in anal sex with the twins, defense counsel elicited testimony from the boy on cross-examination that he never saw defendant's penis. Defense counsel additionally attempted to impeach the child as to certain statements by showing him his conflicting preliminary examination testimony, although counsel had difficulties using the transcript for impeachment, chiefly due to the boy's young age.

The other twin wrote on a paper during direct examination that he saw his brother put his penis in defendant's anus and that defendant "made milk." He testified that defendant made him put his penis in defendant's anus as well. The child further testified that during the incident, defendant shut the door to the room they were in and put towels over the door so as to make it difficult to open. During cross-examination, defense counsel was able to elicit from the child that prior to trial, he had never told anyone that he had been locked in the room with defendant or that the twins were made to put their penises in defendant's anus. As to this child, defense counsel tried to utilize his prior preliminary examination testimony but experienced the same difficulties that he had with the other boy. However, the trial court allowed defense counsel to read into the record a portion of this child's preliminary examination testimony, which showed inconsistencies with his trial testimony. The preliminary exam transcript excerpt was also admitted into evidence.

Given the children's young ages, directly impeaching them through their own prior inconsistent statements understandably proved difficult, as reflected in counsel's efforts. It could also be potentially risky, placing defense counsel in the precarious position of being seen as insensitive or bullying the boys. Despite these difficult circumstances, counsel did elicit some inconsistencies and was able to show that the boys' testimony varied from some of their statements made to other persons and their preliminary examination testimony. We also note that there were inconsistencies between the trial testimony of each child. In light of the record and under the difficult circumstances, we cannot conclude that defense counsel's performance relative to eliciting and showing inconsistencies fell below an objective standard of reasonableness.

Defendant next contends that counsel was ineffective for failing to object to the admission of writings made by one of the twins during trial concerning the allegations against defendant. This twin refused to answer two questions verbally while testifying, but indicated that he would write down the answers. The answers he wrote down were marked as exhibits during trial. According to defendant, there was no legal support for allowing the admission of those written statements, the prejudicial effect of seeing the allegations in the writing of a small child was overwhelming, and that providing the jury with the written testimony of the twin elevated his testimony above every other witness. Defendant has provided no law or rule precluding the admission of the twin's written statements made contemporaneously with live testimony. That being the case, defendant has further failed to set forth the legal basis upon which defense counsel could have objected to the admission of the written statements or to demonstrate that an objection would have been sustained. Defendant has thus failed to meet his burden to show that counsel was ineffective for failing to object to the admission and use of the written statements.[2]

Defendant next argues that counsel was ineffective for failing to object to the testimony of Dr. Debra Simms regarding the ultimate issue of guilt, i.e., whether the twins were victims of sexual abuse. Dr. Simms is a medical doctor at Helen DeVos Children's Hospital who performed a physical examination on both boys after having their histories taken by workers from the Children's Assessment Center. She was qualified to testify as a medical expert in the field of child sexual abuse. Relevant here, the prosecutor asked Dr. Simms, "Can you tell me then, based on the medical history you were provided and the physical examination [of one twin], . . . were you able to come to a diagnosis for [the twin] as it relates to his allegation of sexual abuse?" Defense counsel objected, stating that the prosecution was soliciting an opinion about the ultimate issue in the case. Counsel argued that Dr. Simms could testify regarding the nature of the physical examination, but that she could not give an opinion on the ultimate issue of whether or not sexual abuse may have occurred. The prosecutor suggested that she could rephrase the question, which the trial court permitted. The following exchange then took place:

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[2] We note that MRE 611(a) provides:

> The court shall exercise reasonable control over the *mode* and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) *protect witnesses from* harassment or *undue embarrassment*. [Emphasis added.]

We believe that the language of MRE 611(a) lends some support for the trial court's decision to allow the child to answer the questions in writing.

Q: Do you have an opinion based on reasonable medical certainty as to whether or not your physical examination and medical history are consistent with his allegation of sexual abuse?

A: Yes, ma'am. I do.

Q: And what is that opinion?

A: The finding of a normal physical examination of the perianal area and the oral area does not rule out the allegations that the child made. And, in giving a history, he was clear, consistent, detailed, and descriptive. And—I reached a conclusion of probable pediatric sexual abuse.

Defense counsel did not object to the "rephrased" question, which was essentially the same question as previously posed.[3] Defendant maintains that the failure to object to the question constituted ineffective assistance of counsel. Defendant relies on decisions issued by our Supreme Court in *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990), and *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995), amended on other grounds 450 Mich 1212 (1995). We find that the issue is not controlled by *Beckley* and *Peterson*, given that Dr. Simms was testifying as a physician who conducted an actual physical examinations of the twins, not as an outside expert who was testifying about child CSC victims in general.

Initially, we note that MRE 704 provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *Beckley* concerned experts who "testified regarding the characteristics and patterns of behavior typically exhibited by sexually abused children." *Beckley*, 434 Mich at 697. In *Peterson*, the Court addressed "expert syndrome evidence" regarding "behaviors common in other abuse victims." *Peterson*, 450 Mich at 370. The Supreme Court in *Peterson* modified the ruling in *Beckley* and held:

> In these consolidated cases, we are asked to revisit our decision in . . . *Beckley*, and determine the proper scope of expert testimony in childhood sexual abuse cases. The question that arises in such cases is how a trial court must limit the testimony of experts while crafting a fair and equitable solution to the credibility contests that inevitably arise. As a threshold matter, we reaffirm our holding in *Beckley* that (1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty. However, we clarify our decision in *Beckley* and now hold that (1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child

[3] The prosecutor later asked the same question of Dr. Simms with respect to the other twin. However, in that instance, the doctor only responded that the normal examination was not unexpected; she did not go on to opine that there had likely been sexual abuse.

> sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility. [*Peterson*, 450 Mich at 352-353.]

Because *Beckley* and *Peterson* did not focus on the testimony of an examining physician, they are not helpful for purposes of our analysis. Rather, *People v Smith*, 425 Mich 98; 387 NW2d 814 (1986), is the controlling precedent. In *Smith*, our Supreme Court began its opinion by succinctly setting forth the nature of the issue presented:

> The common question in these prosecutions for first-degree criminal sexual conduct, MCL 750.520b, is whether the trial courts erred so as to require reversal in allowing the *examining physicians to testify that the complainants had been sexually assaulted*. In *Mays*, we find the foundation sufficient; however, because the foundation for the testimony was inadequate in *Smith*, the testimony was improperly admitted. [*Id.* at 101 (emphasis added).]

The Court, citing MRE 704, stated that "[i]t is . . . well-established that expert opinion testimony will not be excluded simply because it concerns the ultimate issue." *Smith*, 425 Mich at 106. The *Smith* Court, reflecting on prior precedent, indicated that an examining physician cannot give an opinion on whether a complainant had been sexually assaulted if the "conclusion [is] nothing more than the doctor's opinion that the victim had told the truth." *Id.* at 109. An examining physician's opinion is objectionable when it is solely based "on what the victim . . . told" the physician. *Id.* Such testimony is not permissible because a "jury [is] in just as good a position to evaluate the victim's testimony as" the doctor. *Id.* However, an examining physician, if qualified by experience and training relative to treatment of sexual assault victims, can give an opinion with respect to whether a complainant had been sexually assaulted when the opinion is based on physical findings and the complainant's medical history. *Id.* at 110-112.[4] The Court held that in the *Mays* case reversal was unwarranted, where the lower court had allowed an examining physician to opine that the complainant had been penetrated against her will in response to the following question posed by the prosecutor:

> "All right. Using your background, your education, your experience, her demeanor, her clothing, her attitude, and what you saw in your examination, all of the things that you know about this person, using all of your experience, did you

[4] The Court made clear that, as to the "history" given by a complainant to a physician, it must be more than the complainant simply claiming that he or she was sexually assaulted. *Smith*, 425 Mich at 112 n 9. Although not entirely evident, the Court seemed to suggest that an opinion that a sexual assault occurred could be based on a complainant's emotional state, but the Court warned that the physician must have specialized knowledge that would enable the physician to draw such an inference. *Id.* at 110-113.

> form an opinion as to whether or not there was sexual penetration against her will?" [*Id.* at 104, 115.]

The Court found that the physician's opinion had been grounded upon objective medical evidence. *Id.* at 115. The *Smith* Court also recognized the same distinction that we make here between testimony from an examining physician and testimony from an expert on typical behavioral patterns in CSC cases:

> Our decision today is made in the context of the particular cases before us, i.e., both cases concerned admissibility of the doctors' opinions which were based on examination of the alleged victims shortly after the incidents. We express no opinion on, e.g., the admissibility of expert psychiatric testimony or rape trauma syndrome evidence, noting only that the rules of evidence should guide any decision on admissibility of expert testimony. [*Id.* at 115 n 13.]

Beckley and *Peterson* were issued after *Smith*, entertaining the issue referenced but not decided in *Smith*.[5] In *People v Swartz*, 171 Mich App 364, 376-378; 429 NW2d 905 (1988), this Court, relying on *Smith*, found admissible a physician's testimony that, in his opinion, the complainant had been sexually assaulted. The Court explained:

> Dr. Slater conducted a physical examination of the victim. On cross-examination, he testified that his opinion was based upon what he observed medically. Although his observation of the victim's emotional state was part of his medical evaluation, Dr. Slater did not base his opinion on the victim's emotional state. Dr. Slater's opinion was based on objective facts obtained from his medical examination of the victim, such as the red mark on her neck and motile sperm in her body. His testimony was therefore admissible to assist the jury in its determination of penetration or penetration against the will of the victim. [*Id.* at 377-378.]

Applying *Smith* and *Swartz* to the case at bar, and considering that Dr. Simms actually conducted physical examinations of the twins, there was nothing improper regarding the prosecutor's question whether Dr. Simms had "an opinion based on reasonable medical certainty as to whether or not [the] physical examination and medical history [were] consistent with [the] allegation of sexual abuse." We note that Dr. Simms never testified that it was her belief that

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[5] We note that in *Peterson*, multiple experts testified on behalf of the prosecution, two of which were physicians who conducted physical examinations of the victim. *Peterson*, 450 Mich at 354. The two physicians testified as to their physical findings and conclusions of suspected sexual abuse premised on the examinations and the victim's medical history. *Id.* The *Peterson* Court was not concerned with these experts, *id.*; rather, the Court's analysis focused on the testimony of two social workers and a clinical psychologist who testified about studies showing fabrication and veracity rates among children claiming sexual abuse and that the victim's behavior was consistent with and symptomatic of sexual abuse. *Id.* at 355-356, 375-379. Again, Dr. Simms testified as an examining physician.

defendant was the particular person who committed the sexual assault. Because the prosecutor's question was proper, defense counsel was not ineffective for failing to object. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) (counsel is not ineffective for failing to raise a futile objection). That said, the nature of Dr. Simms's response appeared to indicate that her conclusion of probable pediatric sexual abuse was not based on objective physical evidence, but rather simply on the child's statements and claims, which, if true, would be improper under *Smith.* On cross-examination by defense counsel, Dr. Simms acknowledged repeatedly that the examinations of both children were normal and that her conclusion of sexual abuse as to the one twin was based solely on what she was told by the child. Defense counsel elicited from Dr. Simms, repeatedly, that she had no way of knowing whether the child's statements were true or false. We are not prepared to find defense counsel's performance deficient for failure to object to Dr. Simms's response of probable pediatric sexual abuse. First, until there was some elaboration by Dr. Simms on cross-examination, it was not immediately clear that her response was indeed improper. Even if it was, an objection and request to strike the testimony proffered at that point in time would not have been of much benefit to defendant; the response had already been heard by the jury and, although a jury is presumed to follow a court's instructions, an instruction to disregard the testimony would likely have held little sway. As opposed to objecting for the second time in a row, which in itself could have found disfavor with the jurors, it was sound trial strategy to simply await cross-examination, at which time defense counsel had the opportunity, which was taken, to elicit the weaknesses in Dr. Simms's conclusion. Defense counsel's performance in regard to this issue did not fall below an objective standard of reasonableness.[6]

Defendant next argues that counsel was ineffective for failing to fully inform defendant of a plea offer. After the first, pre-remand motion for new trial, the trial court found that the plea offer had generally been explained to defendant, but the court also concluded that defendant had not been informed that he would not need to register as a sex offender under the offer. The court, however, ultimately rejected defendant's argument because he did "not explain why the absence of the registration requirement rendered the plea otherwise acceptable to him." Although beyond the parameters of this Court's remand order, the issue was again posed to and addressed by the trial court in regard to the second motion for new trial. The trial court rejected the argument on a different basis, finding that "[t]he plea offer was discussed in detail and placed on the record on March 23, 2010[,] at a status conference . . . [and] [d]efendant was present at that conference with [defense counsel] and [d]efendant's mother."

[6] In the introductory summarization of his argument, defendant sets forth the claims concerning Dr. Simms, which we have addressed above. Defendant also contends that testimony indicating that displays of anger by the twins and other behaviors were consistent with sexual abuse should not have been admitted and should have been objected to by defense counsel. However, there is absolutely no development of this issue in the body of the argument. Accordingly, the issue has been abandoned. *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007) (appellant may not simply announce a position and leave it to this Court to rationalize and discover the basis for the claim and locate supporting authority).

The record contains a transcript of a status conference held on January 19, 2010, in the Kent County Juvenile Court.[7] Defendant, his attorney, and defendant's mother were all present. At the start of the conference, the juvenile court, speaking to the prosecutor, stated, "[F]or everybody's benefit, would you please put the standing plea offer on the record so that we all know exactly what we're talking about here?" The prosecutor responded:

> The offer that is open through today's proceeding, and only through today's proceeding, is that if he pleads to one count of gross indecency and one count of criminal sexual conduct in the first degree, we'd agree to hold the criminal sexual conduct in the first degree under advisement. And if he successfully completes the probation that would be imposed for the gross indecency charge . . ., at the end of that probationary period the CSC first would be dismissed. If he fails to do so, the CSC first, as a juvenile conviction, would enter onto his record and the requirements of registering and so on would take place.
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> If he fails to take advantage of this offer, I have been instructed by . . . the senior [prosecuting] attorney . . . that this case will be dismissed, and he will be processed in adult court because this is an automatic waiver case that will simply proceed.

The juvenile court then indicated that it had been concerned enough about the gravity of the charges if defendant did not take advantage of the plea that the court had appointed a guardian ad litem for defendant. The court then stated:

> So, the best I can say is I've done everything in my power to make sure that [defendant] understands his options here today. I'm certainly not going to engage in any arm twisting because [defense counsel] is a very experienced criminal attorney. But I have to say that this is one of those situations where the offer that's being made – compared to the consequences if the offer is turned down – is so significant that I wanted to make sure that everybody was fully aware of what was going on here.

Defense counsel then acknowledged that he had spoken to defendant about the plea offer. And again, defendant and his mother were present in the courtroom. Defense counsel informed the juvenile court that the plea offer was not being accepted because it required "some kind of admission to some allegations involving . . . sexual conduct." We note that the offer outlined by the prosecutor clearly indicated that sex offender registration would be required only if defendant failed to satisfactorily complete probation.

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[7] The record indicates that this transcript became available only after the *Ginther* hearing had been completed but before the court issued its ruling denying the motion for new trial; the parties had gone forward at the hearing on the mistaken assumption that the status conference in the juvenile court had not been recorded or transcribed. We see no reason not to take this transcript into consideration, as it is part of the record forwarded to us on appeal.

The record also contains a transcript of a status conference held on March 23, 2010, in the trial court. This is the status conference referenced by the trial court in rejecting defendant's argument that defense counsel was ineffective for failing to fully inform defendant of the plea offer. At this status conference, the parties discussed a new plea offer by the prosecution that involved defendant pleading guilty to one count of third-degree criminal sexual conduct, with the prosecutor agreeing to a guidelines minimum sentence range of 12 to 20 months. The trial court placed the offer on the record to make sure that defendant was making an informed choice. Defendant personally indicated that he wanted to go to trial, that he understood the offer, and that he realized that, if found guilty, he could face up to life in prison.

Defendant, apparently unaware of the transcript of the January 19, 2010, juvenile court status conference, now argues that he was not fully informed of the plea offer that was made while he was under the jurisdiction of the *juvenile* court, not the plea offer in the trial court that was the subject of the March 23, 2010, status conference. Given that the transcript of the status conference *in the juvenile court* held on January 19, 2010, shows that the plea was fully explained to defendant, with his mother and counsel present, defendant's argument on appeal is wholly without merit.

Defendant next contends that counsel was ineffective for failing to introduce evidence of defendant's developmental deficiencies. We disagree. While evidence that defendant functioned at a lower than normal level for a 14-year-old may have served to explain why he spent time with the twins in the first place, as opposed to defendant being an outright predator as characterized by the prosecution, it would not have supported the ultimate defense that no sexual assaults took place. That defendant played video games with younger boys because he functioned at a younger level himself did not negate the possibility that he sexually assaulted the twins. Furthermore, evidence that defendant was developmentally disabled may have possibly led a juror to more easily accept the twins' claims predicated on the notion that a developmentally disabled minor might not recognize the inappropriateness of certain behaviors, although not rising to the level of a legal defense. With respect to this argument, we cannot conclude that defense counsel's performance was deficient, nor that defendant was prejudiced by any presumed deficient performance.

Defendant next contends that defense counsel was ineffective for failing to have the preliminary examination transcript corrected prior to trial. During trial, defense counsel read a portion of one of the twin's preliminary examination testimony to the jury. The testimony was displayed on an overhead at the same time so the jury could read along. In reading the testimony, defense counsel would indicate "Q," read the question, and then indicate "A," and read the answer. As he read, defense counsel read a portion where the "Q" and "A" sections were transposed in the transcript, i.e., the "Q" appeared before the answer and vice versa. The trial court interrupted while defense counsel was reading and stated, "This transcript is flawed." Counsel thereafter stated, "It would appear that way. . . . The question and answer[s] [are] reversed." The trial court then stated, "Well, I don't know that, but, you know, this is—you're going to—if this is supposed to be a proper record, it's not a proper record." Counsel nevertheless was permitted to read the remaining portion of the transcript, and the pages read by counsel were admitted into evidence.

Defendant contends that counsel was ineffective for failing to notice the flaw and settle it prior to trial and that the flaw undermined any use of the preliminary exam transcript from that point forward. Not only has defendant failed to support this claim, we find it to be entirely meritless. The point of using the transcript was to impeach a twin with his prior inconsistent preliminary examination testimony. Defense counsel correctly pointed out that the flaw in the transcript was simply that the "Q" and "A" were reversed at times. This did not undermine the reliability of the contents of the transcript and defense counsel still used the transcript to identify inconsistencies in the twin's testimony. Counsel was not ineffective for failing to notice the non-substantive flaw in the preliminary examination transcript and correct it prior to trial.

Defendant next contends that counsel was ineffective for failing to object to testimony given by the twins that was allegedly elicited without the proper foundation. First, defendant takes issue with the following exchange between one of the twins and the prosecutor:

Q: [C]an you describe what his private looked like then?

. . .

A: No. I don't know.

Q: Why not?

A: Because I didn't see his private.

Q: If his—

A: I didn't look at it. I didn't look at his private.

. . .

Q: Was it different than yours?

A: Yes.

Q: How was it different?

A: Well, he's older than me, so I know that.

Q: Um-hum.

A: So I know that it's different than mine. And I remember it was big. I can't really remember though.

Defendant contends that because the child had stated that he did not see defendant's penis, defense counsel should have interjected a foundation objection to the prosecutor's next question regarding differences between defendant's and the child's penises. Defendant's argument does not provide the proper context. An adequate foundation existed where, moments before the above-colloquy, the child had written down and testified that "milk" came out of defendant's penis. This evidence clearly reflected that the child had seen defendant's penis.

Some consideration must be given for the fact that an eight-year-old was testifying. Any objection by defense counsel would have been futile; therefore, counsel was not ineffective. *Ericksen*, 288 Mich App at 201.

Defendant also takes issue with the child's response to the prosecutor's question regarding where the "milk" had gone. The twin responded, "I don't know, probably like in a cup or something." Defendant suggests that defense counsel should have objected to the full response because the child began his answer by stating that he did not know where the "milk" went. It was clear from the response, however, that the child was merely guessing at where the "milk" had gone and did not know the answer. An objection, at best, would have called more attention to the testimony concerning the fact that the twin saw defendant "make milk." And, if an objection had been made and the jury been instructed to disregard the answer, the fact that the child did not know where the "milk" had gone was in no way outcome determinative.

Defendant next claims that there was no foundation for the prosecutor's follow-up question to one of the twins concerning talking to a doctor. When the prosecutor asked the child if he recalled talking to a doctor lady, the child responded that he could not remember. The prosecutor then asked, "If you did talk to the doctor lady, did you tell the doctor the truth?" to which the twin responded in the affirmative. Assuming that counsel should have objected to the questioning based on lack of foundation, the matter had no impact on the ultimate issue of guilt or innocence. Thus, the question did not carry such weight as to affect the outcome of the trial; there was no prejudice.[8] *Carbin*, 463 Mich at 600.

Next, we shall address defendant's arguments, as further developed at the *Ginther* hearing following remand, that defense counsel was ineffective for failing to consult with and retain for trial an expert in forensic psychology and interviews and for failing to effectively cross-examine the prosecution's experts regarding forensic interview protocol as to child victims of sexual abuse. These arguments are based on the testimony of Dr. Daniel Swerdlow-Freed and defense counsel at the *Ginther* hearing. Decisions regarding how to question witnesses are presumed to be matters of trial strategy that we will not assess with the benefit of hindsight. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). The failure to call or question witnesses is presumed to be a matter of trial strategy that we will not second-guess with the benefit of hindsight, and the failure only constitutes ineffective assistance of counsel when it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688

[8] While defendant states that defense counsel was also ineffective for failing to demand a ruling from the trial court regarding admission of the preliminary examination transcript in order to impeach the twins, he does not properly address the merits of his assertion of error or present an argument on the issue. The issue is thus abandoned and we need not address it. *Schumacher*, 276 Mich App at 178. Moreover, as indicated above, a pertinent part of the preliminary examination transcript showing testimonial inconsistencies was admitted into evidence. Prejudice has not been established.

NW2d 308 (2004). "'A substantial defense is one that might have made a difference in the outcome of the trial.'" *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009) (citation omitted). We do recognize that this Court cannot insulate the review of counsel's performance by simply calling it trial strategy, as it must also be determined whether the strategic choices were made after less than complete investigation. *Trakhtenberg*, 493 Mich at 52.

Given defense counsel's testimony at the *Ginther* hearing, along with the testimony by Dr. Swerdlow-Freed, it is certainly arguable that defense counsel's performance fell below an objective standard of reasonableness relative to his failure to cross-examine the prosecution's experts in regard to forensic interview protocol and his failure to consult with and retain an expert in forensic psychology and interviews. However, defendant fails to establish the requisite prejudice. With respect to Dr. Swerdlow-Freed's testimony, he testified about the need to ask open-ended questions, the need to stay away, for the most part, from leading questions, the need to avoid coercive questions, and the need to examine alternate hypotheses when questioning a child who allegedly was the victim of sexual abuse. That said, the prosecutor's expert witnesses also testified to the same protocol in their testimony, so we cannot help but question the prejudice to defendant in not having his own expert testify to the protocol.

Dr. Swerdlow-Freed testified that the interviews of the twins by Holly Bathrick, who was a prosecution witness and testified about forensic interview protocol, were problematic because the interviews were not recorded and because the report ultimately composed by Bathrick regarding the interviews was based on handwritten notes taken by a detective who observed the interviews. We fail to see how the presentation of expert testimony that such a procedure was not proper would have changed the outcome in this case. And defense counsel, even without an expert, made much of the issue, arguing as follows in his closing:

> We have this lady [Bathrick] take the stand and tell us all of her credentials and how she does things to try to assess the truth, and try to figure out what happened, and tell us all the methods by which she does this[.] . . . And then, days after doing that, days after doing this interview, she doesn't even rely on her own notes; she gets the police officer's notes, who's watching through a glass, who doesn't tape record it, who doesn't do any of this stuff, and then she writes a report. You're the professional, you did the interview, write your own notes.

That the interviews should have been recorded or that the report should have been based on Bathrick's own notes in order to more accurately reflect the interviews is something that a lay person could certainly grasp and understand. Had Dr. Swerdlow-Freed testified on behalf of defendant at trial on this matter consistent with his testimony at the *Ginther* hearing, it would not have added much to the defense and clearly not enough to alter the result.

Dr. Swerdlow-Freed also testified about the apparent lack of clarity in some of Bathrick's questions, the possibility that some of the questions were leading or suggestive, and the apparent failure to follow-up on some of the statements by the twins, which went to the need to explore alternate hypotheses. We use the terms "apparent" and "possibility," given that Dr. Swerdlow-Freed had to couch these views based on speculation, where he emphasized that Bathrick's report was not sufficiently detailed to allow him to make conclusive determinations, which is why, in his view, such interviews should be recorded. We, of course, are then also left in a swirl

of speculation. Had Dr. Swerdlow-Freed or a comparable expert been available to defense counsel prior to trial for consultation and/or at trial as a witness, the only way to have further explored the matter in any meaningful fashion would have been through questioning and confrontation of Bathrick while on the witness stand. Had that occurred, Bathrick may have been able to elaborate in a manner that wholly negated the concerns raised by Dr. Swerdlow-Freed, or her testimony may have been significantly impeached. Bathrick was not called by defendant to testify at the *Ginther* hearing, so defendant again has failed to show the necessary prejudice. In that same vein, we can only speculate that had defense counsel been fully aware of all aspects of forensic interview protocol, it would have made a difference in the outcome. Cross-examination of the prosecution's experts that challenged whether the proper protocol was employed may have just as easily resulted in elaboration by the witnesses that solidified their opinions.

A good portion of Dr. Swerdlow-Freed's testimony was devoted to supposed post-event influences of others on the twins that called into question the twins' credibility. The basis of the doctor's position was simply the extensive inconsistencies and contradictions in the accounts given by the twins as to what transpired. While we do not endorse the trial court's reasoning in rejecting defendant's arguments, some of which found no support in the record, we do share the concerns voiced by the court and the prosecutor at the *Ginther* hearing regarding Dr. Swerdlow-Freed's credibility and improper-influence conclusions predicated on inconsistent and contradictory accounts given by the twins. The concern was that the issue of credibility based on different and conflicting versions of what occurred is a matter for the jury. Had Dr. Swerdlow-Freed or a comparable expert been retained by defendant for trial and testified to credibility and improper influences, there may have been a basis to exclude the testimony as invading the province of the jury. Regardless, it would have added little to the defense, as lay persons are more than capable of understanding that inconsistencies in accounts relative to an alleged event call into question the credibility of persons who claim that the event took place. Obviously, the jurors here found the twins credible regardless of the numerous inconsistencies.

While the twins' testimony about the type and degree of sexual contact did vary depending on the person to whom they related the incidents, the twins always maintained that some type of penetration occurred. Most significantly, one of the boys reported to a forensic interviewer and then wrote in response to a question during trial that during the incidents defendant "made milk." The child indicated that "milk" came from defendant's penis. This evidence is consistent with a young child describing the act of ejaculation. The following is an excerpt from the cross-examination of Dr. Swerdlow-Freed by the prosecutor at the *Ginther* hearing:

> *Q.* And you were concerned about the question that was asked, "Did anything come out of his penis?"
>
> *A.* Right.
>
> *Q.* Do you think that that suggested the answer "milk"?
>
> *A.* It suggested – it could have suggested that something came out of his penis.

Q. But would it suggest the statement that milk came out of his penis?

A. No.

Q. Would it be fair to say that, if you heard a description of milk coming out of the penis, that that's – by a six-year-old, that that's probably describing semen?

A. I would agree with that.

Had such a colloquy occurred at trial, it certainly would not have benefited defendant. More likely, the prosecution would have emphasized the testimony in closing arguments and the jury would have considered it damaging to the defense.

In sum, assuming that defense counsel was ineffective for failing to consult with and retain for trial an expert in forensic psychology and interviews and for failing to effectively cross-examine the prosecution's experts regarding forensic interview protocol, defendant has failed to satisfy his burden to show that the errors were prejudicial, i.e., that there existed a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Carbin*, 463 Mich at 600.

Finally, defendant contends that he was denied his due process right to a fair trial based on prosecutorial misconduct. Defendant further contends that defense counsel was ineffective in failing to object to the misconduct. Defendant specifically objects to four separate statements made by the prosecutor in her rebuttal closing argument. This Court generally reviews de novo allegations of prosecutorial misconduct. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). We examine claims of prosecutorial misconduct on a case by case basis, evaluating challenged remarks in context, in order to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). We have carefully scrutinized the four alleged instances of misconduct and conclude that reversal is unwarranted. The prosecutor's remarks were not improper, as they were in direct response to questionable and labored arguments posed by defense counsel in his closing argument, they asked the jurors to focus on the testimony and evidence actually presented to them at trial, and the remarks pointed out, by reference to the record, the inaccuracies in defense counsel's arguments. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008) (prosecutors may "argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case"); *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997) (a prosecutor's remarks "must be considered in light of defense arguments"); *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996) (a comment that might otherwise be improper "may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument").

We conclude that, with respect to these unpreserved claims of error, defendant has failed to establish error, plain or otherwise. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Even were we to assume that the prosecutor crossed a line of acceptability with respect to the challenged remarks, defendant has not shown that any presumed error affected his substantial rights, i.e., that he was prejudiced, as none of the comments were outcome-

determinative. *Id.* at 763. Furthermore, even if the remarks were prejudicial, they did not result "in the conviction of an actually innocent defendant," nor did they seriously affect the integrity, fairness, or public reputation of the judicial proceedings independent of defendant's innocence. *Id.* As to the bootstrapped ineffective assistance of counsel claims, defendant, once again, has failed to establish the requisite prejudice. *Carbin*, 463 Mich at 600.[9]

In conclusion, whether examined independently or collectively, the arguments presented by defendant on appeal do not warrant reversal.

Affirmed.

/s/ William B. Murphy
/s/ Henry William Saad

[9] Defendant presents a couple of additional arguments in his supplemental brief on appeal; however, because the arguments were not presented in his original appellate brief, and because the arguments fall outside the scope of the remand order, they are not subject to consideration. *People v Burks*, 128 Mich App 255, 257; 339 NW2d 734 (1983) ("Issues outside the scope of a remand order will not be considered on appeal following remand."). Moreover, the arguments do not warrant reversal even upon substantive inspection.